

Chan Kam Fad & Ors v Government of Malaysia & Ors

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HIGH COURT (KUCHING) — SUIT NO 136 OF 2002-I/III
SANGAU GUNTING J
13 APRIL 2012

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Public Servants — Salary — Claim to higher salary scale — Technical assistants ('TAs') dissatisfied over emplacement on clerical pay scale — Whether TAs could prove they had right qualifications for emplacement on higher scale — Whether subject matter of suit already decided by Public Services Tribunal at instance of one plaintiff — Whether Tribunal's decision final and binding on all plaintiffs and not open to question or challenge in court

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The plaintiffs, all of whom had Senior Cambridge or Sijil Pelajaran Malaysia ('SPM') qualifications, were appointed as technical assistants ('TAs') in the Lands and Surveys Department, Sarawak where they underwent a two-year in-service technical assistant course. The plaintiffs were unhappy with the fact they were emplaced on the C10 salary scale pursuant to the Cabinet Committee Report's Service Circular No 2/78 ('SC 2/78'). The C10 scale, the plaintiffs contended, was a clerical pay scale and that they should have been emplaced on the B8 salary scale instead. The plaintiffs claimed that because of that anomaly, when the New Technical Service Scheme ('NTSS') came into effect in 1989, the TAs who were in the C10 category were put under the C7 salary scale instead of being emplaced on the B7 salary scale and that subsequent to that, when the Sistem Saraan Baru ('SSB') was implemented in 1992, the plaintiffs were at first placed under the N9 Ad Hoc Basis Classification Administrative and Supporting Group and then on the J7 salary scale as Survey Technicians when they ought to have been put on the J5 scale under the SSB. The plaintiffs pleaded that by emplacing them on the 'wrong' salary scales under the CCR, the NTSS and the SSB, the defendants had acted 'wrongfully, fraudulently, negligently and deliberately' to cause the plaintiffs to suffer irreparable loss and damage. They claimed they were deprived of their right under art 8 of the Federal Constitution to be treated equally with other public servants holding the same designation and work functions as TAs. In the instant action, the plaintiffs sought an order to be immediately emplaced on the J5 salary scale of the SSB and to be paid the differences in salary that they were entitled to if they had been properly emplaced on the 'rightful' salary scales under the CCR, NTSS and SSB. The defendants contended that under the SC 2/78, the plaintiffs must have had a recognised diploma to qualify to be emplaced on the B8 salary scale as engineering assistants. However, they only had Senior Cambridge or SPM qualifications which qualified them for entry to Group C. The two-year in-service TA course was not recognised by the Public

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- A Services Department Malaysia as sufficient qualification for emplacement to the B8 scale. Prior to the instant action and before the Public Services Tribunal ('PST') was dissolved by Parliament in the year 2000, the PST had dismissed the first plaintiff's claim concerning the same issue raised in the instant suit ie whether or not he should have been placed under the B8 scale under the CCR
- B instead of the C10 scale. The defendants submitted that the PST's decision on the issue was final and binding upon all the plaintiffs and that pursuant to s 15(1) of the Public Services Tribunal Act 1977 (now repealed), the PST's decision could not be challenged, appealed against, reviewed, quashed or called into question in any court.

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Held, dismissing the action with costs:

- (1) The PST had decided against the first plaintiff and based on s 15(1) of the Public Services Tribunal Act 1977 and relevant case law it was clear the PST's decision was final, conclusive and binding on all the parties to the anomaly and its decision could not be challenged, appealed against, reviewed, quashed or called into question in any court. On that finding alone, the plaintiffs' claim had to be dismissed (see para 37).
- (2) The plaintiffs had failed to prove on balance of probabilities that they were entitled to be emplaced on the B8 salary scale. The plaintiffs did not possess any kind of Diploma entitling them for entry to Group B. The qualifications they had was an entry qualification to Group C (see paras 64–66).
- (3) The plaintiffs had downplayed the fact that in relation to the emplacement issues they were given options and they chose to accept those options (see para 54).
- (4) The purported particulars of fraud raised in the statement of claim were merely general allegations. It was not sufficiently clear what the purported material facts particularised were and the formulation of those purported material facts or particulars to enable the defendants to properly respond. The plaintiffs' emphasis was on the consequences of the defendants' action and insufficient focus was placed on the precise ascertainment of material facts showing particulars of the alleged fraud (see para 72).

[Bahasa Malaysia summary]

- Plaintif-plaintif, kesemuanya berkeelayakan Senior Cambridge atau Sijil Pelajaran Malaysia ('SPM'), telah dilantik sebagai pembantu teknikal ('PT') di Jabatan Tanah dan Ukur, Sarawak di mana mereka telah menjalani kursus dua tahun dalam perkhidmatan pembantu teknikal. Plaintif-plaintif tidak gembira dengan hakikat yang mereka diletakkan pada skala gaji C10 menurut Pekeliling Perkhidmatan Laporan Jawatankuasa Kabinet No 2/78 ('PP 2/78'). Skala C10, plaintif-plaintif berhujah, adalah skala gaji kerani dan bahawa

mereka patut sebaliknya diletakkan pada skala gaji B8. Plaintiff-plaintif mendakwa bahawa disebabkan anomali tersebut, apabila Skim Perkhidmatan Teknikal Baru ('SPTB') mula dikuatkuasakan pada tahun 1989, PT yang diletakkan dalam kategori C10 telah diletakkan di bawah skala gaji C7 dan bukan diletakkan pada skala gaji B7 dan bahawa berikutan itu, apabila Sistem Saraan Baru ('SSB') dilaksanakan pada tahun 1992, plaintiff-plaintif pada mulanya diletakkan di bawah N9 Klasifikasi Ad Hoc Kumpulan Sokongan dan Pentadbiran dan kemusdian pada skala J7 sebagai juruteknik ukur apabila mereka sepatutnya berada pada skala J5 di bawah SSB. Plaintiff-plaintif mempli bahawa dengan meletakkan mereka pada skala gaji 'salah' di bawah CCR, SBTB dan SSB, defendan-defendan telah bertindak secara 'wrongfully, fraudulently, negligently and deliberately' hingga menyebabkan plaintiff-plaintif mengalami kehilangan dan kerugian yang tidak boleh diperbaiki. Mereka mendakwa mereka dinafikan hak mereka di bawah perkara 8 Perlembagaan Persekutuan untuk dilayan sama rata seperti penjawat awam lain yang memegang jawatan dan fungsi kerja sama seperti PT. Dalam tindakan ini, plaintiff-plaintif memohon perintah untuk segera diletakkan pada skala gaji J5 SSB dan dibayar perbezaan gaji yang mereka berhak menerima jika dengan betul telah diletakkan pada skala gaji yang 'rightful' di bawah CCR, NTSS dan SSB. Defendan-defendan berhujah bahawa di bawah PP 2/78, plaintiff-plaintif hendaklah mempunyai diploma yang diiktiraf untuk melayakkan untuk ditempatkan pada skala gaji B8 sebagai pembantu kejuruteraan. Walau bagaimanapun, mereka hanya mempunyai kelayakan Senior Cambridge atau SPM yang melayakkan mereka untuk kemasukan Kumpulan C. Kursus TA perkhidmatan dalaman dua tahun tidak diiktiraf oleh Jabatan Perkhidmatan Awam Malaysia sebagai kelayakan yang mencukupi untuk peletakan pada skala B8. Sebelum tindakan ini dan sebelum Tribunal Perkhidmatan Awam ('TPA') dibubarkan oleh Parlimen pada tahun 2000, TPA telah menolak tuntutan plaintiff pertama berkaitan isu sama yang ditimbulkan dalam guaman ini, iaitu sama ada atau tidak dia patut diletakkan di bawah skala B8 di bawah CCR dan bukan pada skala C10. Defendan-defendan berhujah bahawa keputusan TPA berhubung isu itu adalah muktamad dan mengikat semua plaintiff-plaintif dan menurut s 15(1) Akta Tribunal Perkhidmatan Awam 1977 pada masa itu (sekarang dimansuhkan), keputusan TPA tidak boleh dicabar, dirayu, dikaji semula dibatalkan atau dipanggil untuk dipersoalkan dalam mana-mana mahkamah.

Diputuskan, menolak tindakan dengan kos:

- (1) TPA telah memutuskan terhadap plaintiff pertama dan berdasarkan s 15(1) Akta Tribunal Perkhidmatan Awam 1977 dan kes undang-undang relevan ia adalah jelas keputusan TPA adalah muktamad, konklusif dan mengikat semua pihak-pihak kepada anomali itu dan keputusannya tidak boleh dicabar, dirayu, dikaji semula,

- A dibatalkan atau dipanggil untuk dipersoalkan dalam mana-mana mahkamah. Atas penemuan itu sendiri, tuntutan plaintif terpaksa ditolak (lihat perenggan 37).
- B (2) Plaintif-plaintif telah gagal membuktikan atas imbangan kebarangkalian bahawa mereka berhak untuk diletakkan pada skala gaji B8. Plaintif-plaintif tidak memiliki apa-apa jenis diploma yang melayakkan mereka memasuki Kumpulan B. Kelayakan mereka adalah kelayakan kemasukan dalam Kumpulan C (lihat perenggan 64–66).
- C (3) Plaintif-plaintif telah memandang rendah fakta bahawa berkaitan isu-isu peletakan itu mereka diberikan pilihan dan mereka telah memilih untuk menerima pilihan tersebut (lihat perenggan 54).
- D (4) Butiran yang dikatakan fraud ditimbulkan dalam pernyataan tuntutan hanya dakwaan umum. Adalah tidak cukup jelas apa fakta material yang dikatakan telah diperincikan itu dan pembentukan fakta atau butiran material bagi maksud tersebut untuk memastikan defendan-defendan menjawab dengan betul. Penekanan plaintif-plaintif adalah berhubung akibat tindakan defendan-defendan dan fokus yang tidak cukup diletakkan pada penentuan tepat fakta-fakta penting yang menunjukkan
- E butir-butir fraud yang dikatakan (lihat perenggan 72).]

Notes

For a case on claim to higher salary scale, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) para 2172.

F Cases referred to

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147, HL (refd)
Gabongan Kesatuan Pekerja-Pekerja dalam Perkhidmatan-Perkhidmatan Kerani dan Bersekutu Kerajaan v Ketua Pengarah Perkhidmatan Awam & Anor [1998] 5 MLJ 209, HL (refd)

- G *Government of Malaysia v Rohaya bte Mohd Majzub & Ors* [1989] 1 MLJ 96; [1989] 1 CLJ 147, SC (refd)
Helen Lim Ah Hui & Ors v Ketua Pengarah Perkhidmatan Awam & Ors [2002] 2 MLJ 472; [2002] 1 LNS 61, HC (refd)
- H *Mohandas a/l Mukundan v Jabatan Perkhidmatan Awam & Anor* [2010] 3 MLJ 259; [2010] 4 CLJ 724, HC (refd)

Legislation referred to

Evidence Act 1950 ss 101, 103

- I Federal Constitution arts 8, 112, 132, 132(2), Ninth Schedule, List I, Item 6(d)
 Financial Procedure Act 1957 s 15(3)
 Pensions Act 1980
 Public Service Tribunal (Dissolution) Act 2000

Public Services Tribunal 1977 (repealed by the Public Service Tribunal (Dissolution)) Act 2000 ss 2(b), (c), 11, 12, 15(1), Part II A
State Public Service General Order 1996 (Sarawak) general order 170(3)
Robert Hii Tim Kuok (Hii & Co Advocate) for the plaintiffs.
Dewi Rahmaz bt Majidi (State Attorney, Attorney General's Chambers Kuching) B
for the third and fourth defendants.

Sangau Gunting J:

PRELIMINARIES C

[1] The remaining parties to the instant suit are the plaintiffs and the third and fourth defendants. The first and second defendants (respectively the Government of Malaysia and the Public Services Department) are no longer parties, and the final decision which resulted in the first and second defendants ceasing to be parties appears not to have been appealed against. D

THE BASIC PLEADINGS E

[2] Possessing Senior Cambridge Qualification or Sijil Pelajaran Malaysia, all the plaintiffs were appointed as technical assistants ('TAs') in the Lands and Surveys Department, Sarawak. They all also underwent and completed a two-year full time technical assistant course. They aver the aforesaid notwithstanding, they were classified under the C10 salary scale, 'which is the clerical pay scale and not the pay scale for technical staff'. F

[3] The third and fourth defendants ('the defendants') more specifically say, plaintiffs 1 to 6 were appointed prior to 1978 as TAs under D1A, 1-3 scale for the clerical and technical group during the implementation of Suffian Salary Scheme. The defendants aver the third defendant had adopted the Cabinet Committee Report ('CCR') vide *Pekeliling Perkhidmatan Bilangan 2 Tahun 1978* ('PP2/78') on 1 July 1978. The defendants say according to PP2/78 'Technical Assistants in Department of Agriculture, Land and Survey, Mineral and Geology who were previously under the salary scale of D1A, 1-3, be placed under a new salary scale i.e. scale C10'. The defendants further aver the first to sixth plaintiffs all accepted an option given to them under PP2/78, and that the implementation of the new salary scale under PP2/78 was backdated to 1 January 1976. Concerning the seventh to 20th plaintiffs who were appointed after 1 July 1978, the defendants say they 'were rightly placed under C10 salary scale for Technical Assistant as provided for under PP2/78'. G
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[4] In their reply it seems the first to sixth plaintiffs reiterate their view, that

- A the C10 salary scale presumably under which they were classified 'is the clerical pay scale and not the pay scale for technical staff'. The first to sixth plaintiffs also aver 'the Director of Land Survey, Sarawak *delayed* in confirming this new scheme of service under the CCR and did so only on the 27th March 1982 5 years after the first–sixth plaintiff signified their assent to the new scheme of service under CCR'. (Emphasis added.)
- B Curiously, however, the first to sixth plaintiffs also aver 'The State Government however *failed* to implement the new scheme of service under the CCR', and that, '(a)s a result the 1st to 6th plaintiffs continued to be paid as clerical staff on C10 scale and not as technical staff on B8 Scale'. (Emphasis added.)
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- [5] In this connection, it may be noted that while the first to sixth plaintiffs admit to the C10 salary scale having been backdated to the 1 January 1976, they seem to say (see para 4 of their statement of reply) the backdated salary scale ought to have been under B8 rather than C10. Similarly, the plaintiffs aver
- D the seventh to 20th plaintiffs 'were wrongly placed under C10 salary scale, as they should have been placed under B8, B GROUP Salary Scale under CCR'. The plaintiffs reiterate para 6 of their statement of claim which, in the manner of its formulation, seems to imply that since the seventh to 20th plaintiffs were
- E appointed as TAs after the implementation of the new scheme of service under the CCR, they should have been in B8, B group salary scale ('secara isyarat'), rather than in the C10 salary scale. Except for the said appointment as TAs after the 1 July 1978, the defendants vehemently deny all allegations in the said para 6, 'and the plaintiffs are put to strict proof thereof'.

- F [6] To the plaintiffs, inter alia, the aforesaid emplacement of the seventh to 20th plaintiffs to C10 salary scale instead of to the B8, B group salary scale ('secara isyarat'), and the land and survey director's having allegedly 'delayed in confirming this new scheme of service under the CCR' constitute 'an abuse of
- G process by all defendants in the exercise of their respective powers'.

- [7] Under paras 9, 10 and 11 of the statement of claim, the emphasis of the first to sixth plaintiffs seems to be on their contention, that with effect from the respective dates upon which they exercised option under the CCR, they
- H 'assumed and carried out their duties and work functions as a Technical Assistant'. In support of this contention, it seems they rely on 'an Official Memorandum based on CCR principles provided on the 27th of March 1982 and a draft scheme of service provided to the plaintiffs'. Presumably, according to the draft scheme of service, 'the duties undertaken by the plaintiffs were that
- I of Technical Assistant'. The plaintiffs aver to the effect, that although the first to sixth plaintiffs, 'at all material times, were working for the defendants in the capacity of Technical Assistants but were paid a clerk's salary pursuant to the new scheme of service under the CCR, which was backdated to 1st January 1976'.

[8] Concerning paras 1 and 8–11 of the statement of claim, the defendants in their defence aver as follows:

- 4(a) the implementation of P.P.2/78 was never delayed and was an ongoing process and in fact the implementation of P.P.2/78 was backdated to 1st January 1976;
- (b) under P.P.2/78 the Plaintiffs were not qualified to be placed under B8 salary scale for the post of Engineering Assistant. Based on the Plaintiffs' point of entry in the service, they were appointed under D1A, 1-3 or C10 (as the case may be) with Senior Cambridge Qualifications or Sijil Pelajaran Malaysia;
- (c) further the 3rd and 4th Defendants will say that in order to be qualified for emplacement under B8 salary scale, the plaintiffs must have a recognized diploma. The Plaintiff's 2 years' full time in-service Technical Assistant course was not recognised by the 2nd Defendant as an equivalent qualification for emplacement under B8 salary scale as Engineering Assistant.

The defendants deny all other allegations in the aforesaid paras 7–11 of the statement of claim.

[9] In their reply the plaintiffs deny para 4(a) above and reiterate para 7 of their statement of claim pertaining to, inter alia, the alleged delaying by the Director of Land and Survey in confirming the new scheme of service under the CCR resulting in the first to sixth plaintiffs' having continued to have been paid 'as clerical staff on C10 and not as technical staff on B8 Scale'. In denying the defendants' assertions under para 4(a)–(c) of the statement of defence, the plaintiffs maintain 'they should have been placed under the B8 salary scale as they had assumed the duties and responsibilities as laid out in the official memorandum based on CCR principles provided on 27th March 1982 and the performance of these duties and responsibilities were certified by a Certificate of Verification dated 28.11.1992'. The plaintiffs further aver, they 'shall rely on the said Official memorandum and Certificate of Verification and paragraph 0.8 of the Cabinet Committee Report 1976 and anomaly as construed under Section 2(b) of the Public Services Tribunal Act 1977 and/or Section 2(c) of the Public Services Tribunal Act 1977 (Amendment) 1992 that constitute a departure or deviation from the principles underlying the recommendation of the Cabinet Committee by virtue of JKK-MGGSA report (October 1991) during the trial of this matter'.

[10] Quite clearly, the plaintiffs' claim that during the implementation of the CCR pursuant to PP2/78 all of them, *mutatis mutandis* as to the respective effective dates, ought to have been emplaced on B8 instead of C10 — is based

A substantially on their having undergone a two-year technical assistant course, and on their contention that the duties and responsibilities they performed were that of a technical assistant.

B [11] The plaintiffs in their statement of claim aver the State Government of Sarawak ('the third defendant') (presumably on 1 January 1989 or thereafter) 'had failed to implement the New Technical Service Scheme', under which they say 'Technical Assistants were entitled to a salary under the B7 scale of the New Technical Service Scheme'. The plaintiffs aver 'since the Sarawak State Government had failed to implement this scheme, the 1st to 20th plaintiff (sic) were not given an option under the New Technical Scheme of Service and therefore the 1st to 20th plaintiffs were still paid at the C10 salary scale even though they assumed and carried out the duties and responsibilities as Technical Assistant ...'.

D [12] The plaintiffs in their statement of claim then refers to the *Sistem Saraan Baru* ('SSB') which was implemented by the government on 1 January 1992. Thereafter they aver: 'Since the plaintiffs were not included in the New Technical Service Scheme, the plaintiffs were wrongfully emplaced in the N9 Ad Hoc Basis Classification Administrative and Supporting Group when the plaintiffs should rightfully have been emplaced in the J15 SSB Classification Engineering Scheme of Service'.

F [13] The third and fourth defendants admit the third defendant adopted the New Technical Service Scheme on 18 January 1990, but the effective date was 'backdated to 1st January, 1989'. The defendants aver under the New Technical Service Scheme, 'the Technical Assistants appointed under the salary scale of C10 were converted to Survey Technician (*Juruteknik Ukur*) under the salary scale of C7'. At the material time the defendants say the plaintiffs were holding the post of technical assistant under the salary scale of C10, and with the implementation of the New Technical Service Scheme, the plaintiffs' posts were 'converted to the post of Survey Technician (*Juruteknik Ukur*) under the salary scale of C7 effective from 1st January, 1989'.

H [14] Concerning the implementation of the New Technical Service Scheme, the defendants aver: 'the conversion under the New Technical Service Scheme was only implemented by the third defendant in 1997 but the effective date of the New Technical Service Scheme was backdated to 1st January 1989 ... the late implementation of the Scheme did not adversely affect the plaintiffs since the enforcement date thereof had been backdated and all arrears in salary were duly paid by the plaintiffs'.

I [15] In their reply, the plaintiffs deny the aforesaid (para 13) in this manner: '... without the 1st to 20th plaintiffs exercising any option under the New

Technical Service Scheme, the 3rd and 4th defendants had wrongfully, fraudulently, negligently and deliberately confirmed all the plaintiffs in the C7 scale of the New Technical Service Scheme and in that premise the plaintiff's (sic) deny paragraph 6(b) of the Statement of Defence'. It appears, therefore, that by para 10 of the plaintiffs' reply, all averments of the defendants under paras 6(a)–(c) are admitted by all the plaintiffs except for their complaint of their allegedly not having exercised any option under the New Technical Service Scheme, and the plaintiffs' thereafter interpreting such non-exercising by themselves of any option under the New Technical Service Scheme to mean 'the third and fourth defendants had wrongfully, fraudulently, negligently and deliberately confirmed all the plaintiffs in the C7 scale of the New Technical Service Scheme'.

[16] The defendants aver the reason why the plaintiffs were given option to be placed under N9 Ad Hoc Basis Classification and Supporting Group during the implementation of the *Sistem Saraan Baru* ('SSB') was because, 'at that time the plaintiffs were still holding the post of Technical Assistant, C10 which was not listed under SSB'. In their reply (para 11), the plaintiffs maintain 'they were wrongfully emplaced in the N9 Ad Hoc Basis Classification and Supporting Group when the plaintiffs should have been emplaced in the J5 SSB Classification Engineering Scheme of Service'.

[17] The defendants aver that based on the advice of the second defendant (Public Service Department, Malaysia) (no longer a party to the proceeding), the omission presumably of giving option to the plaintiffs to be placed under N9 Ad Hoc Basis Classification and Supporting Group 'was remedied in 1995 whereby the plaintiffs were given another option under SSB to be placed as Survey Technician, J7 and the implementation of it was backdated to 1st January 1992'. The plaintiffs contend they should have been placed under the J5 of SSB and not under J7 of the SSB. Implicitly, it seems the plaintiffs here are also saying the Public Service Department, Malaysia (the second defendant) was wrong in advising the defendants to give the plaintiffs 'another option under SSB to be placed as Survey Technician, J7...'.

[18] The third and fourth defendants maintain that 'the emplacement of the plaintiffs as survey technician, J7 under SSB was proper and correct since it is the correct conversion for the post of survey technician, C7 under the New Technical Service Scheme, the enforcement of which had been back dated to 1 January 1989'. The defendants deny all other allegations of the plaintiffs under paras 12–13 of the statement of claim. In their reply, besides refuting the aforesaid defendants' denial of 'all other allegations', the plaintiffs aver 'they should have been placed under B7 instead of C7 and then be converted to J5 SSB and not J7 SSB'.

- A** [19] The rather copious para 14 of the plaintiffs' statement of claim basically smacks of an attempt to ventilate the plaintiffs' arguments of presumably why, in their view, the decision of the Public Services Tribunal dated 22 November 1995 concerning the first plaintiff's anomaly claims resulted 'in gross injustice'. The plaintiffs' underlying complaint seems to be that 'the DG (director general) consciously misled the Public Services Tribunal into believing that the
- B** 1st plaintiff was emplaced on scale J7'. The root cause of this complaint appears to be the allegation of presumably the first plaintiff, that '(a)fter the dispute (presumably the anomaly claims) was referred to the Tribunal the DG and his
- C** representatives had intimidated the 1st plaintiff to sign an option accepting the salary scale which document was not, at all material times accepted by the 1st plaintiff. Notwithstanding this fact the DG consciously misled the Public Services Tribunal into believing that the 1st plaintiff was emplaced on scale J7'.
- D** [20] In this connection, the plaintiffs aver the following: 'The 1st plaintiff submitted 2 anomaly claims dated 23rd of May 1993 and 16th of June 1993 under the Public Services Tribunal Act 1977 to seek redress in the matter, as a test case which involved two issues:
- E** (a) Decision of the Public Services Tribunal dated 22.11.1995 on the claim of the above-mentioned anomaly; and the emplacement of the 1st plaintiff and others on grade 17 with effect from 1.1.1992 by the Tribunal;
- (b) Claim of the 1st plaintiff for reference to the Public Services Tribunal to rectify the anomaly arising from the Cabinet Committee Report which
- F** anomaly continued to be anomaly under the Sistem Saraan Baru Scheme in the letter dated 3rd September 1999.'
- G** [21] Concerning (b) above, after referring to ss 11–12 of the Public Service Tribunal Act, the plaintiffs alleged '(t)he Director General ... failed to carry out negotiations as provided in Part II of the Public Service Tribunal 1977 ... failed to certify in writing of any failure and serve a copy of the certificate on the 1st plaintiff'. The plaintiffs then aver 'The consequences of the failure on the part of the Director General to comply with Part II of the Public Service Tribunal
- H** Act, 1977 has resulted in the denial of justice as the Public Services Tribunal ceased to be in existence with the passing of the Public Service Tribunal (Dissolution) Act 2000 in Parliament'.
- I** [22] In respect of the whole of para 14 of the statement of claim, the defendants aver: 'Save that the 1st plaintiff had submitted claims under the Public Service Tribunal Act 1977 and that the said Public Service Tribunal was dissolved by the passing of the Public Service Tribunal (Dissolution) Act 2000, all other allegations in paragraph 14 ... are denied and the plaintiffs are put to strict proof thereof'.

[23] The defendants admit para 15 of the plaintiffs' statement of claim, which states: 'The said claims (presumably as paragraphs 18 above) were refused by the Government but by a letter dated 16th February 2001, the plaintiffs were given leave to refer and file an action in the courts in this matter by the Sarawak State Government pursuant to General Order 170(3) Perintah-Perintah Am Perkhidmatan Awam Negeri 1996'.

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[24] Paragraph 16 of the statement of claim states:

The Defendants at all material time have wrongfully, fraudulently, negligently and deliberately failed to comply with the principles of CCR implemented in the new scheme of service under the CCR in 1978, the New Technical Scheme of Service and the Sistem Saraan Baru, as a result of which the plaintiffs' have suffered irreparable loss and damage and were further deprived of their constitutional right under Article 8 of the Federal Constitution to be treated equally with other public servants holding the same designation and work functions of Technical Assistants. The particulars of which is within the full knowledge of the defendants and are enumerated below.

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- (a) The Defendants have wrongfully, fraudulently, negligently and deliberately paid the Plaintiffs a clerk's salary on the C10 scale, new scheme of service scheme (sic) under the CCR knowing fully well that the Plaintiffs were appointed as Technical Assistants and were required to perform duties, responsibilities and work functions and technical survey field duties such as cadastral and/or topographical surveys of a person holding the post of a Technical Assistant.
- (b) The 1st to 6th Plaintiffs were entitled to be paid from personal to holder basis according to the technical assistant salary scale which is B8, from 1st January 1976 and the 7th to 20th plaintiffs were entitled to be paid according to the technical assistant salary which is B8, from their respective dates of appointment (secara isyarat).
- (c) The Plaintiffs were denied emplacement in B7 scale of the New Technical Service Scheme dated 1st January 1989 backdated to 1st October 1988 because the defendants have fraudulently, negligently and deliberately failed to give the Plaintiffs any option to convert to the New Technical Service Scheme. The Plaintiff's (sic) as public servants were legally entitled to be given the option under the New Technical Service Scheme, which would emplace them on the B7 scle, New Technical Service Scheme.
- (d) As a result of the Defendants wrongful, fraudulent, negligent and deliberate actions, all the Plaintiffs were denied their emplacement in the J5 Sistem Saraan Baru salary scale effective from 1st January 1992 Classification Engineering Scheme of Service and were only placed on an Ad Hoc Basis on a clerk pay of N9 Classification Administrative and Supporting Group commencing on 1st January 1992.
- (e) Further and (sic) in the alternative the options given to the Plaintiffs to be

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- A** emplaced on N9 Ad Hoc Basis Classification Administrative and Supporting Group, Sistem Saraan Baru was also offered by the Defendants out of time and not on or before 31.3.1992.
- (f) Without the 1st to 20th plaintiffs exercising any option under the New Technical Service Scheme, the defendants wrongfully fraudulently, negligently and deliberately confirmed all the Plaintiffs in the C7 scale of the New Technical Service Scheme on or about 1996-1997 and were paid arrears of salary from 31st December 1991 backdated to 1st January 1989.
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- (g) The Plaintiffs were then wrongfully, fraudulently, negligently and deliberately emplaced in the J7 Sistem Saraan Baru scale of the Sistem Saraan Baru pursuant to an option, which was given to the plaintiffs, out of time, that is, after 31st of March 1992, the final date to accept the option. The J7 Sistem Saraan Baru option was given vide Pekeliling Perkhidmatan Bil.9. Tahun 1991.
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- (h) Particulars of the various salary scales and the sums due in accordance to the date of implementation of the CCR, New Technical Service Scheme and the Sistem Saraan Baru shall be furnished during the trial of this matter.
- D**

E [25] Paragraph 17 of the statement of claim provides:

Wherefore the Plaintiffs pray for an order that:-

- (a) The 1st to 20th Plaintiffs to be immediately emplaced from 17 to 15 of the Sistem Saraan Baru.
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- (b) The 1st to 6th Plaintiffs to be paid the difference in the salary from the C10 salary scale to B8, B Group salary scale of the new scheme under the CCR, from 1st January 1976 to 30th September 1988.
- (c) The 7th to 20th Plaintiffs be paid the difference in the salary from C10 to B8 of the new scheme under the CCR or in the alternative 'secara isyarat', from the date of their respective appointments to 30th September 1988.
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- (d) That the 1st to 20th Plaintiffs be paid the difference in salary from C10 to B7 JKK of the New Technical Service Scheme from 1st October 1988 to 31st December 1991.
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- (e) That the 1st to 20th Plaintiffs be paid the difference in salary from N9 Sistem Saraan Baru to J5 Sistem Saraan Baru until the date of the respective emplacement of the plaintiffs to J7 under the Sistem Saraan Baru.
- I**
- (f) That whatever arrears wrongfully paid to the Plaintiffs on the C7 scale be deducted, without interest, from the sums due and owing herein to the Plaintiffs.
- (g) That the 1st to the 20th Plaintiffs be paid the difference in salary from 17 Sistem Saraan Baru to J5 of the Sistem Saraan Baru from the date of their respective conversion to 17 until the date of judgment.

- (h) Interest at the rate of 8% per annum on the sums prayed for in paragraphs (a) to (e) and (g) from the date stated therein to the date of judgment and thereafter at a rate of 8% until the date of realization. A
- (i) Costs; and
- (j) Any other relief which this Honourable Court deem fit and proper. B

[26] It would appear that the said para 16 of the statement of claim basically reiterates the plaintiffs' various complaints and allegations averred to in the paragraphs preceding para 16. Paragraph 16 also purports to provide the particulars of fraud. Paragraph 17 of the statement of claim enumerates the plaintiffs' various prayers. C

[27] The defendants aver 'No loss or damage as alleged by the Plaintiffs or at all in paragraph 16 of the Statement of Claim, is admitted and the plaintiffs are put to strict proof thereof. With regard to other allegations therein contained, paragraphs 2, 4 and 6 of this Defence are repeated. Further ... the Plaintiffs' claims herein are misconceived, mala fide, scandalous and vexatious and ought to be dismissed with costs'. In their reply, the plaintiffs deny the aforesaid averments of the defendants and join issue with them. The plaintiffs contend 'that the letter dated 16.2.2001 by the Sarawak State Government is sufficient proof that the Plaintiffs (sic) claim is far from misconceived, mala fide, scandalous and vexatious'. D

THE ISSUES E

Agreed issues to be tried F

[28] A statement of agreed issues to be tried (prepared by the plaintiffs) dated 11 May 2011 enumerates the following issues: G

- (a) whether or not the plaintiffs who were appointed as technical assistants should be placed under B8 CCR instead of C10 salary scale? H
- (b) whether or not the seventh to 20th plaintiffs who were appointed as technical assistants after 1 July 1978 (after the implementation of the new scheme of service under the CCR should have been placed in the B8, B Group salary scale ('secara syarat') and not in the C10 salary scale? I
- (c) whether or not the Director of Land and Survey, Sarawak delayed the confirmation of the new scheme of service under the CCR?
- (d) whether or not the third and fourth defendants failed to implement the new scheme of service under the CCR as a result of which the first to sixth plaintiffs continued to be paid as clerical staff on C10 scale?
- (e) whether or not the first to sixth plaintiffs had assumed and carried out

- A** their duties and functions of a technical assistants (sic) with effect from the date upon which they exercised their option on 3 June 1978 by the first plaintiff and on or about in the month of June 1978 by the second to sixth plaintiffs?
- B** (f) whether or not the duties and responsibilities assumed by all the plaintiffs that of technical assistants?
- New Technical Service Scheme
- C** (g) whether or not the third and fourth defendant had failed to implement the New Technical Service Scheme resulting in the first to 20th plaintiffs being paid in the C10 scale even though the first to 20th plaintiffs had assumed and were carrying out duties and responsibilities as technical assistants?
- D** The Sistem Saraan Baru
- (h) whether or not the plaintiffs were wrongfully emplaced in the N9 Ad Hoc Basis Classification Administrative and Support Group?
- E** (i) whether or not the defendants have wrongfully, fraudulently, negligently and deliberately failed to comply with the principles of CCR, implemented the new scheme of service under the CCR in 1978, the New Technical Scheme of Service and the *Sistem Saraan Baru*, as a result of which the plaintiffs have suffered loss and damage and were further deprived of their constitutional right under art 8 of the Federal Constitution to be treated equally with other public servants holding the same designation and work function of technical assistants and as particularised at para 16(a)–(h) of the statement of claim? and
- F**
- (j) whether or not the plaintiffs are entitled to the orders prayed for at para 17(a)–(j) of the statement of claim?.
- G**

Disputed issues to be tried

- H** [29] The plaintiffs also prepared a list of disputed issues to be tried also dated 11 May 2011 as follows:
- (a) whether or not the Director of Land and Survey, Sarawak delayed the confirmation of the new scheme of service under the CCR by the first to sixth plaintiffs, which confirmation was only done on 27 March 1982?
- I**
- (b) whether or not the third and fourth defendants failed to implement the new scheme of service under the CCR as a result of which the first to sixth plaintiffs continued to be paid as clerical staff on C10 scale and not as technical staff on B8 scale?

- (c) whether or not the duties and responsibilities assumed by all the plaintiffs were laid out in an official memorandum based on CCR principles provided on 27 March 1982 and a draft scheme of service was provided by the plaintiffs, which confirms that the duties undertaken by the plaintiffs were that of technical assistants? **A**
- (d) whether or not the facts that the plaintiffs were performing duties of technical assistants were also certified by the certificate of verification dated 28 November 1992? **B**
- The Sistem Saraan Baru **C**
- (e) whether or not the plaintiffs were wrongfully emplaced in the N9 Ad Hoc Basis Classification administrative and Supporting Group and should have emplaced in the J5 SSB Classification Engineering Scheme of Service? **D**
- (f) whether or not the director general had misrepresented material facts to the tribunal? **E**
- (g) whether or not the director general and his representatives had intimidated the first plaintiff to sign an option accepting (sic) the salary scale? **F**
- (h) whether or not the director general consciously misled the public services tribunal into believing that the first plaintiff was emplaced on scale J7? **G**
- (i) whether or not the fraudulent conduct of the director general result in gross injustice being meted out to the first plaintiff? **H**
- (j) whether or not the decision of the tribunal was based on fraudulent facts is wrong in law? **I**
- (k) whether or not the director general:
- (i) failed to carry out negotiations provided in s 12 Part II of the Public Services Tribunal Act 1977; and
 - (ii) failed to certify in writing of any failure and to serve a copy of the certificate on the first plaintiff;
- (l) whether or not as a result of the failure on the part of the director general to comply with Part II of the Public Services Tribunal Act 1977 has resulted in a denial of justice as the public services tribunal ceased to be in existence with the passing of the Public Services Tribunal (Dissolution) Act 2000 in Parliament? **I**

[30] It would appear not all the issues agreed or otherwise were dealt with by either or both parties in their respective submissions. And those issues dealt with by either or both parties were not dealt with in the sequence as

- A enumerated above or in any particular sequence. It may also be noted, that in their attempt to strenuously articulate and substantiate their claim, from time to time, while presenting arguments on any particular issue or matter, with respect, there seems to be tendency on the part of the plaintiffs to proliferate issues or points of arguments along the way, thereby to some extent contributing to the complexity in ascertaining the parameters and substance of their arguments vis a vis each of the main issues the determination of which was necessary to decide the granting or otherwise of the plaintiffs' various prayers in the statement of claim.
- B

C SUBMISSIONS

The public service tribunal's dismissal of the first plaintiff's anomaly claim — issues relating thereto

- D [31] It would appear appropriate to first deal with the defendants' contention, that the undisputed dismissal on 22 November 1995 by the public services tribunal ('PST') of the first plaintiff's claim 'is final, conclusive and binding on all the parties to the anomaly and its decision cannot be challenged, appealed against, reviewed, quashed or called in question in any Court (section 15(1))'. The anomaly referred to appears substantially similar to the primary issue raised by all the plaintiffs in the instant suit: whether or not the plaintiffs who were appointed as technical assistants should be placed under B8 CCR instead of C10 salary scale. Therefore, according to the defendants, the decision of the PST in respect of the said issue would be final and binding upon not only the first plaintiff, but to all the rest of the plaintiffs. In support, besides s 15(1) of the Public Services Tribunal Act 1977, the defendants also cited case authorities ie *Gabongan Kesatuan Pekerja-Pekerja dalam Perkhidmatan-Perkhidmatan Kerani dan Bersekutu Kerajaan v Ketua Pengarah Perkhidmatan Awam & Anor* [1998] 5 MLJ 209 and *Helen Lim Ah Hui & Ors v Ketua Pengarah Perkhidmatan Awam & Ors* [2002] 2 MLJ 472; [2002] 1 LNS 61.
- E
- F
- G

- H [32] In the plaintiffs' response (a) the plaintiffs referred to the defendants having 'consented to this action being filed in court', (b) the plaintiffs contend the defendants did not plead that the decision of the PST is conclusive and binding, and therefore ought not to be allowed at this stage to raise the same, (c) the plaintiffs contend that presumably by virtue of the defendants having given 'leave'/'consent' to the plaintiffs' filing the instant action, the defendants 'have waived their right to be bound by the decision of the Public Services Tribunal Act (sic) and are now estopped in law and by their conduct from doing so now', and (d) the plaintiffs contend *Gabongan Kesatuan Pekerja-Pekerja dalam Perkhidmatan-Perkhidmatan Kerani dan Bersekutu Kerajaan v Ketua Pengarah Perkhidmatan Awam & Anor* [1998] 5 MLJ 209 and
- I

Helen Lim Ah Hui & Ors v Ketua Pengarah Perkhidmatan Awam & Ors [2002] 2 MLJ 472; [2002] 1 LNS 61 could be distinguished in that in the instant case there is 'the letter dated 16.2.2001 giving leave/consent for the plaintiffs to file this action in court'.

[33] Before proceeding further, perhaps, it is pertinent to refer to a portion of the relevant findings of the PST dated 22 November 1995. After rejecting the 'kelayakan Sijil Ukur dari Sekolah Latihan Ukur Bersama Sabah/Sarawak' as being equivalent to a diploma, the PST said, that even if it were correct the first plaintiffs allegation that during the CCR he had already fulfilled the requirements to be emplaced to B8 salary scale, it does not mean the first plaintiff could automatically be promoted or emplaced to that post. More specifically, the PST expressed the following view: 'Berkaitan dakwaan Pemohon yang menurutnya semenjak masa Laporan Jawatankuasa Kabinet lagi telah memenuhi syarat untuk dinaikkan pangkat atau ditukarlantik ke jawatan Pembantu Teknik Ukur, B8 (JKK), kami berpendapat, jika pun benar dakwaan Pemohon itu, tidaklah bermakna beliau secara automatik boleh dinaikkan pangkat atau tukarlantik ke jawatan itu. **Beliau perlu memenuhi kelayakan-kelayakan seperti diperakukan Ketua Jabatan. Lebih-lebih lagi, pengisian ke jawatan tersebut memerlukan kelulusan Lembaga Kenaikan Pangkat atau Pihak Berkuasa Melantik.** Oleh yang demikian, kami tidaklah dapat menerima hujah Pemohon berdasarkan prinsip kelayakan dan Latihan supaya beliau dibayar gaji Gred J5 kerana beliau hanya mempunyai kelayakan Pembantu Teknik, C10 (*ad-hoc*) dan menjalankan tugas jawatan yang disandangnya'. (Emphasis added.)

[34] It would appear the plaintiffs themselves raised in their pleadings some matters or issues pertaining to the decision of the PST dated 22 November 1995. For instance, one of the matters pleaded under para 14(c)(iv) is, that 'The *decision* of the Tribunal based on fraudulent facts is wrong in law'. (Emphasis added). In the circumstances, notwithstanding that 'fraudulent conduct' and 'misrepresentation of material facts' are attributed to the 'Director General' who has since been no longer a party to the instant action, and although the defendants seem not to have specifically pleaded that the PST's decision is conclusive and binding, it would appear no longer tenable the implicit contention of the plaintiffs that the issue concerning thereto could no longer be invoked by the remaining defendants.

[35] It would appear, that the plaintiffs themselves in their pleadings (paras 14–15 of the statement of claims) have implicitly, at least, reserved their right to raise matters pertaining to the said decision of the PST albeit obliquely in their pleadings. Considered from another viewpoint — if, by virtue of their pleadings it was open to the plaintiffs to raise the issue whether the decision of the PST was not conclusive and binding and therefore it could still be

- A challenged, it would be unjust not allow the defendants, should they wish to do so, to raise arguments on the same issue. In this context, it would, therefore, no longer be sustainable the plaintiffs' contention, that the defendants ought not to be allowed, at this stage, to raise the 'whether conclusive and binding issue' concerning the decision of the PST on the ground it was not pleaded.
- B Furthermore, such an issue is substantially an issue of law.

- C [36] The defendants contend as wrong the plaintiffs' submission, that the leave given by the defendants to the plaintiffs to institute the instant legal proceedings has the effect of the defendants having waived their right to be bound by or to rely on the decision of the PST. With respect, this contention of the defendants would appear tenable. As pointed out by the defendants the said leave to enable the plaintiffs to institute the instant action was given pursuant to general order 170(3) of the State Public Service General Order 1996. Giving such leave to institute the instant action ought not to prevent the
- D defendants as parties to the instituted action to the thereafter put up defences, including, inter alia, reliance on the decision of the PST and s 15(1) of the Public Services Tribunal Act 1977.

- E [37] Based on the said s 15(1) and the case of *Gabongan Kesatuan Pekerja-Pekerja dalam Perkhidmatan-Perkhidmatan Kerani dan Bersekutu Kerajaan v Ketua Pengarah Perkhidmatan Awam & Anor* [1998] 5 MLJ 209 it seems quite clear, that 'The decision of the tribunal is final, conclusive and binding on all the parties to the anomaly and its decision cannot be challenged, appealed against, reviewed, quashed or called in question in any court'. As
- F pointed out in *Gabongan Kesatuan Pekerja-Pekerja dalam Perkhidmatan-Perkhidmatan Kerani dan Bersekutu Kerajaan v Ketua Pengarah Perkhidmatan Awam & Anor*, this would appear to be so unless an error of jurisdiction or an error of law has been committed by the tribunal in its
- G decision (*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147). It would appear that based on this finding alone, the plaintiffs' claim would have to be dismissed.

The main issues submitted on by the parties considered

- H [38] In the event that the aforesaid finding is wrong, I would proceed to consider what appear to be the main issues. Concerning the issue whether or not the plaintiffs who were appointed as technical assistants should be placed under B8 CCR instead of C10 salary scale, the defendants contend, that based
- I on the *Pekeliling Perkhidmatan Bilangan 2 Tahun 1978* ('PP2/78'), technical assistants in Department of Agriculture, Land and Survey, Mineral and Geology who were previously under the scale of D1A, 1-3 were to be placed under C10. In support, PP2/78, *Jadual Bilangan (Sar) S 3009*, item 16 at pp 514-515 of exh D2 (wrongly referred to as exh D1 although it is a

continuation of exh D1) was cited. The plaintiffs clearly come under *pembantu teknik* (technical assistant), Jabatan Tanah dan Ukur, D1A, D1, D2, D3, and therefore according to PP2/78 their new salary scale would be C10.

A

[39] According to the defendants, the first to sixth plaintiffs were given an option under PP2/78 and all of them accepted, referring to pp 05–08, 031–033, 060–063, 080–083, 108–116 (seems to have been wrongly typed as 106 in the submission) and 123–127 of exh D1. Referring to EO/2739/3 dated 5 June 1978 on p 429 of exh D2, the defendants say the effective date of PP2/78 was on 1 June 1978 but the implementation of the new salary scale under PP2/78 was backdated to 1 January 1976. As regards the seventh to 20th plaintiffs who were appointed after 1 July 1978, the defendants contend they ‘were rightly placed under C10 salary scale for technical Assistant as provided for under P.P.2/78’.

B

C

[40] According to the defendants under PP2/78 the plaintiffs ‘were not qualified to be placed under B8 salary scale which is the salary scale for the post of Engineering Assistant’. The defendants say ‘(t)he Plaintiffs’ 2 years’ full time in-service Technical Assistant course was not recognised by the 2nd defendant (Public Services Department, Malaysia) as an equivalent qualification for emplacement under B8 salary scale as Engineering Assistant’. The defendants further contend, as emplacement under B8 salary scale required a recognised diploma, the plaintiffs could not be emplaced under the said salary scale. The defendants refer to Section III — Schemes of Service (a) salary group and entry qualification on p 497 of exh D2. That notwithstanding, according to the defendants, ‘a serving officer under Juruteknik scheme can be promoted by appointment (Kenaikan Secara Lantikan ‘KPSL’) to a post in the Pembantu Teknik Scheme subject to the conditions as provided in Lampiran ‘H’ (Skim Perkhidmatan Pembantu Teknik Ukur) at pages 604 to 607 of Ex.D.2’.

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[41] The plaintiffs appear to be disputing the relevance to their complaint of the letter from the *Ketua Pengarah Perkhidmatan Awam* dated 1 June 1989 entitled ‘Pelaksanaan Struktur Baru Perkhidmatan Teknikal’, and which contains ‘Lapiran H’ referred to by the defendants. The defendants appear to be saying, that notwithstanding the requirement of a recognised diploma in order to be eligible to be emplaced to B8 salary scale, and notwithstanding the non-recognition by the Jabatan Perkhidmatan Awam (‘JPA’) of the two-year in service technical assistant course as an equivalent qualification for emplacement to B8 salary scale, ‘a serving officer under Juruteknik scheme can be promoted by appointment (Kenaikan Pangkat Secara Lantikan, ‘KPSL’) to a post in the Pembantu Teknik Scheme subject to the conditions as provided in Lampiran ‘W’ at pages 604 to 607 of Ex. D2.’

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H

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[42] The plaintiffs say ‘Kenaikan Pangkat Secara Lantikan was only

A implemented with the Sistem Saraan Baru in 1992 for new posts called
Pembantu Teknik Ukur ...’ They contend KPSL ‘was not implemented during
the implementation of CCR principles or during the implementation of the
New Technical Scheme of Service in 1989, or during the time when the 1st
B plaintiff’s Tribunal Decision was delivered in 1995’. It seems, however, that
KPSL is merely a description of the process in which a serving officer could be
promoted otherwise than by fulfilling the formal qualification requirements
such as, in the case of a technical assistant wanting to be emplaced under B8
salary scale, a recognised diploma as earlier on mentioned. In other words, by
C the aforesaid contention of the plaintiffs, it does not definitely show that the
adoption of the means and/or process called KPSL was commenced only in
1992. The relevancy point or the contention that KPSL did not exist at the
material time, therefore, has not, on balance of probability, been proved by the
plaintiffs.

D [43] Anyway, the plaintiffs say ‘the issue at hand is the Plaintiffs grievances
for not being emplaced on B8 under CCR principles’. The plaintiffs’ main
focus seems to be ‘the Plaintiffs were negligently, wrongly and/or fraudulently
placed on C10 scale ...’. It was on 1 July 1978 that the third defendant
E ‘adopted the Cabinet Committee Report (‘CCR’) vide Pekeliling
Perkhidmatan Bilangan 2 Tahun 1978’. From what could be gleaned from the
submissions of the plaintiffs, the root cause of their complaint of (a) having
been denied emplacement on B8 salary scale presumably during the
implementation of New Technical Service Scheme in 1989, (b) of having been
F denied emplacement on J5 salary scale SSB and was only placed on an ad hoc
basis on a clerk pay of N9 of N9 Classification Administrative and Supporting
Group commencing on 1 January 1992, and (c) having been wrongfully,
fraudulently, negligently and deliberately confirmed in the C7 scale of the New
Technical Service Scheme — was the defendants’ having in the first place
G allegedly ‘wrongfully, fraudulently, negligently and deliberately placed the
plaintiffs on C10 scale’ presumably in 1978.

[44] As such it would appear crucial to determine whether, to begin with, the
defendants were correct in having decided to place the plaintiffs on C10 and if
H so, whether thereafter the procedure(s) adopted by the defendants in
implementing their said decision was/were correctly followed. After the
emplacement of the plaintiffs on the C10 salary scale, whether thereafter there
ever arose a situation or situations where the defendants ought to have made
the necessary rectification vis a vis and/or consequential presumably to the
I defendants’ having allegedly, in the first place, ‘wrongfully, fraudulently,
negligently and deliberately placed the plaintiffs on C10 scale’ presumably in
1978.

[45] Before proceeding to deal with the aforesaid issue, it seems not

impertinent to note the manner the plaintiffs formulated their basic allegation against the defendants. It would be noted the manner the plaintiffs combined the words ‘wrongfully, fraudulently, negligently and deliberately ...’ This manner also appears to have been adopted in their pleading, for example, para 13 of the reply which contains the following phrase, ‘the third and fourth defendants had wrongfully, fraudulently, negligently and deliberately ...’. (Emphasis added.) The lumping together of ‘wrongfully, fraudulently, negligently and deliberately’ would appear to have, in any case, evinced serious uncertainty or even confusion on the part of the plaintiffs themselves as to the precise nature and/or extent of the complaint and/or allegation they attempt to raise in this suit against the defendants.

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[46] Perhaps, one could be wrongful and negligent at the same time. But could one be fraudulent and/or worse still deliberate and be negligent at the same time? Plain logic dictates that the answer would have to be in the negative. The manner of formulation of the allegation and / or complaint against either or both the defendants itself, with respect, is seriously ambiguous if not contradictory. There would therefore be unfairness or even injustice in any expectation on the part of the plaintiffs that the precise nature of their complaint and/or allegation could be ascertained. More specifically, are the plaintiffs saying that in the performance of their duties relating particularly to the issues at hand, the defendants were negligent, or deliberate and/or fraudulent? It would have to be either negligence or that there were elements of deliberateness and/or fraud. The plaintiffs could have, of course, pleaded in the alternative, but it seems this was not done on this aspect of the pleadings.

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[47] Reverting to the issue of alleged wrongful (not forgetting the plaintiffs’ having at the same time lumped this allegation together with alleged, not only negligence, but also fraud and deliberateness) emplacement of the plaintiffs on C10 salary scale, to maintain proper perspective, it would appear important not to overlook the fact, that at the time of implementing the CCR presumably in accordance with the PP2/78, clearly the New Technical Scheme and the *Sistem Saraan Baru* were yet to come into existence.

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[48] By *Surat Pekeliling (Perj) Bil 2/90* the third defendant adopted the New Technical Service Scheme (‘NTSS’) on 18 January 1990. It would appear that the conversion under the NTSS was implemented only in 1997, but its effective was backdated to 1 January 1989. Presumably in support, the defendants refer to ‘*memorandum rasmi*’ dated 5 May 1997 CMO 15 (p 10, exh D1). The defendants contend, ‘The late implementation of the Scheme did not adversely affect the Plaintiffs since the enforcement date thereof had been backdated and all arrears in the salary were duly paid to the Plaintiffs’.

H

I

[49] Referring to the ‘Tatacara Pelaksanaan Penyandang Ke Struktur Baru

- A Perkhidmatan Teknikal' (*lampiran C*) p 588 of exh D2, vol 2, the defendants say under NTSS, the technical assistants appointed under the C10 salary scale were converted to survey technician (*juruteknik ukur*) under the salary scale of C7. The defendants contend, 'There was no option given for the conversion from C10 to C7 because it was a better scheme of service and it did not involve change of a scheme of service'. The plaintiffs on the other hand say they were entitled to have been given under the option under the NTSS, 'which would emplace them on the B7, New Technical Service Scheme'. It seems rather ambiguous what the plaintiffs are contending here. It is to be noted, that if the requirement is such the plaintiffs ought to be under the B8 (equivalent to J5) salary scale in order to be eligible to be emplaced under the B7 salary scale, then the plaintiffs' argument would appear to be again dependent on whether or not to begin with they were eligible to be placed under the B10 salary scale during the implementation of the CCR.
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- C
- D [50] Referring to pp 16–21 and pp 133–135 of exh D1, and *lampiran E1* under *Surat Tawaran Sistem Saraan Baru Kepada Anggota Tetap Sektor Awam*, DW1 (Norleha bt Shariff) says to the effect, that those whose posts were *pembantu teknik* Scale C10 including the first and sixth (Ting Jack Gei) plaintiffs, were offered to be emplaced to *juruteknik ukur*, Grade J7. While not knowing the plaintiffs allegation that they were 'wrongfully, fraudulently, negligently and deliberately emplaced in the J7 SSB scale', DW1 does know of their complaint that 'they should have been emplaced on Grade J5/B8'. The plaintiffs' advocate put it to DW1 'that Chan Kam Fad (1st Plaintiff) did not actually sign on page 19 (the relevant option form (Ex.D1, page 19)). DW1 testified the 1st Plaintiff did sign it on 31.12.1995, i.e. after his anomaly claim was dismissed by the Public Service Tribunal on 22.11.1995. Based on the said page 19, the 1st Plaintiff did, on 31.12.1995, sign the Surat Akuan Penerimaan Oleh Anggota below the sentence, 'Dengan ini saya mengaku menerima surat tawaran pemindahan gaji dan syarat-syarat perkhidmatan baru ...'
- E
- F
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- H [51] Upon implementation of the SSB on 1 January 1992, 'the plaintiffs were given option to be placed under N9 Ad Hoc Basis Classification Administrative and Supporting Group because at that time the plaintiffs were still holding the post of Technical Assistant, C10 which was not listed under SSB'. According to the defendants, this was done on the advice of the advice of the second defendant (Public Services Department Malaysia). The relevant copies of the plaintiffs' option forms (C10 to N9) were referred to as per pp 11–15, 37–40, 67–70, 87–90, 110–111, 123–127, 145–148, 167–171, 185–188, 203–206, 222–224, 256–260, 274–275, 291–295, 335–338, 353–359, 371–373, 392–393 and 413–416 of exh D2.
- I

[52] The third and fourth defendants say upon the advice of the second defendant, the omission (presumably the non-listing of technical assistant C10

post under the SSB) was remedied in 1995. According to the third and fourth defendants, 'the plaintiffs were given another option under the SSB to be placed as Survey Technician, J7 and the implementation of it was backdated to 1st January, 1992'. Referred to were the relevant copies of the plaintiffs' option forms (C10 to J7) as per pp 16–21, 41–47, 71–76, 91–95, 112–115, 129–132, 149–154, 172–176, 189–195, 207–211, 226–231, 261–266, 281–284, 298–301, 340–344, 375–381, 394–400, and 417–422 of exhs D1 and D2. In this connection, it has been referred to just now the first and sixth plaintiffs' having signed their respective option forms.

[53] Besides containing an inherent inconsistency if not a contradiction as earlier adumbrated, the plaintiffs' allegation of 'wrongful, fraudulent, negligent and deliberate actions' on the part of the third and fourth defendants also seems to be simultaneously 'multifocal'. For instance, based on their pleadings and submissions, this allegation focuses, not only on their emplacement on an ad hoc basis 'on a clerk pay of N9 (Classification Administrative and Supporting Group commencing on 1 January 1992', but also on their (the plaintiffs') emplacement on the J7 *sistem saraan baru* scale 'pursuant to an option'.

[54] With respect, these allegations appear to have, not only downplayed the fact, that in relation to the aforesaid emplacement issues, the plaintiffs were given options and that they chose to accept those options, but also smack of having overlooked the pivotal role played by the second defendant in the third and fourth defendants' decision to adopt the actions as they did concerning the emplacement and other related issues vis a vis the 20 plaintiffs. In this respect, it may not be impertinent to note, that the plaintiffs did not lodge any appeal notice concerning the Court of Appeal's striking out of the suit as against the first and second defendants, resulting in them, thereafter and throughout the trial, no longer being parties to the instant suit between the plaintiffs and the third and fourth defendants.

[55] Perhaps, it is appropriate, at this juncture, to allude to the plaintiffs' reference to the draft scheme of service as shown by p 29 of exh P1. According to the defendants, that draft scheme of service ('DSS') proposes 'that an officer who served as Technical Assistant and had undergone two years' training in the Joint Sarawak/Sabah Survey School and have been confirmed in their appointments and having not less than 6 years' experience in the grade be emplaced to B8 Salary Scale'. Implicit in the third and fourth defendants' submission seems to be that, the plaintiffs having adduced no evidence of the said DSS having been approved by the second defendant, and there being in fact no such approval, 'the third and fourth defendants have no authority to emplace the plaintiffs to B8'.

[56] However, that is not the end of the matter. The defendants provided

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A presumably reasons why they have no authority to emplace the plaintiffs on B8. More specifically they say they have no authority over the scheme of service of the plaintiffs as permanent and pensionable officers. According to the defendants, this is so notwithstanding art 132(2) of the Federal Constitution which basically provides, 'the qualifications for appointment and conditions of service of persons in the public service of any State may be regulated by State law and, subject to the provisions of any such law, by the Ruler or Yang di Pertua Negeri of that State'.

C [57] The defendants purport to elaborate thus: 'The service of permanent and pensionable officers are governed under the federal law including the Pensions Act 1980 (Act 227). Tensions and compensation for loss of office, gratuities and conditions of service' is a federal subject matter listed under Item 6(d) of List I in the Ninth Schedule of the Federal Constitution. This is also evident from the provision of Article 112 which provides restriction on alteration in establishments of State and matters that need the approval of the Treasury under section 15(3) of the Financial Procedure Act 1957'. It seems to be the defendants' submission that although 'it is within the authority of the defendants to decide on the qualifications for appointment and conditions of service of persons in the public service', nevertheless, regards must be had to federal laws such as the aforesaid. The defendants also cite *Mohandas a/l Mukundan v Jabatan Perkhidmatan Awam & Anor* [2010] 3 MLJ 259; [2010] 4 CLJ 724 and *Government of Malaysia v Rohaya bte Mohd Majzub & Ors* [1989] 1 MLJ 96; [1989] 1 CLJ 147 (SC) which held, inter alia, 'The court should not usurp the functions of the tribunal or government in matters of salary scales and conditions of service'.

G [58] It would appear that in reply, the plaintiffs refer to the interpretation of art 112 of the Federal Constitution as enunciated by Justice Datuk Clement Skinner during the hearing of the first and second defendants' striking out application. It seems to be the plaintiffs' observation, that based on the learned judge's decision art 132 does not apply, and neither have the third and fourth defendants pleaded arts 132(2) and 112 of the Federal Constitution and ought, therefore, not be allowed to rely on those articles.

H [59] To begin with, the enunciations by the learned judge must be viewed in its proper perspective and context. It seems undisputed that the main issue in that application concerns the nexus between the plaintiffs and the first to second defendants. However, the specific issues relevant to and which ought to be dealt with under the main issue in that application need to be ascertained vis a vis the issues which need adjudication in the instant suit between the remaining parties, the plaintiffs and the third and fourth defendants.

[60] In this connection, with respect, the plaintiffs' stand and/or reliance on

the pleading or otherwise by the third and fourth defendants of either or both articles 132(2) and 112 has become seriously blur. On p 9 of their submission dated 15 September 2011, presumably based on the decision in the aforesaid striking out application, the plaintiffs state their view of the stand of first and second defendants (Government of Malaysia and Public Services Department Malaysia), that is, *inter alia*, 'the employees of the State Government of Sarawak and adoption of any of the scheme of services where (in all probability this must have been intended to be 'were') the sole prerogative of the State Government of Sarawak ...' the plaintiffs thereafter contended the first to second defendants' 'having succeeded in its application that there is no cause of action against the Government of Malaysia and PSD, the Government of Malaysia and the PSD has (sic) to comply with the Order of this Court and is estopped in law and/or litigation by its own conduct (applying to strike out the action) from challenging any decision made in this Court and/or the compliance thereof'.

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[61] Perhaps, it is not impertinent not to overlook the fact, that the parties in the said striking out application were the plaintiffs and the first to second defendants. The third and fourth defendants were not in the scene. Hence, the question arises whether, when dealing with the instant suit between the remaining parties (the plaintiffs and the third and fourth defendants) and presumably by virtue of the decision in the said striking out application, the third and fourth defendants could no longer rely on and/or refer to facts and/or laws dealt with in the striking out application in explaining their view, that in the instant suit they have no authority over the scheme of service of the plaintiffs as permanent and pensionable officers.

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[62] Perhaps, another way of looking at this rather knotty issue, is by asking-assuming the first to second defendants were 'estopped' as contended by the plaintiffs, would that finding necessarily also bar the third and fourth defendants from referring to and/or relying upon, for instance, the Pensions Act 1980 and the Financial Procedure Act 1957 (undisputedly federal laws) in their endeavour to elaborate and/or justify their contention, that they have no authority over the scheme of service of the plaintiffs as permanent and pensionable officers? With respect, the answer must be in the negative. In any case, for one thing, it would be unfair to the remaining third and fourth defendants. After all, the ramifications of specific decisions of the third and fourth defendants in their adoption and implementation of respectively the CCR, New Technical Services Scheme and SSB Scheme were not dealt with in, or in any case, not the core subject matter of the said striking out application.

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[63] Therefore, notwithstanding art 132 which appears indicative of the third and fourth defendants' having the sole prerogative and discretion whether to adopt and implement the said three schemes of services, in the exercise of the

- A third and fourth defendants' management prerogative concerning members of their own public service, with respect, it was nevertheless within the third and fourth defendants' discretion to consult and/or seek advice from the first to second defendants. Inter alia, such consultation would ensure, that the exercise of the third and fourth defendants' management prerogative or any aspect thereof, such as emplacement of the plaintiffs to B8 salary scale, would not run afoul of any rules and regulations which are within the purview of or over which the first defendant and/or the second defendant exercise(s) the sole authority. In any case, as earlier adumbrated, it is the third and fourth defendants' stand, that the plaintiffs' educational qualification at the material time did not meet the requirements for them to be emplaced on the B8 salary scale.

- D [64] The third and fourth defendants contend the plaintiffs 'failed to prove how they can be entitled to be emplaced in B8'. They say PP2/78 and specifically para 4.1(i) on p 497 of exh D2 shows, that the entry requirement for direct appointment to the post in group B was a diploma or high school certificate/*sijil tinggi persekolahan*. Having only Senior Cambridge Certificate which is equivalent to Malaysian Certificate of Education ('MCE') or *Sijil Pelajaran Malaysia* ('SPM'), the defendants say none of the plaintiffs possessed any kind of diploma entitling them for entry to group B.

- F [65] The third and fourth defendants contend Senior Cambridge Certificate, Malaysian Certificate of Education (MCE) or *Sijil Pelajaran Malaysia* (SPM) is the entry qualification to group C. Referring to p 500 of exh D2, they say the plaintiffs adduced no evidence presumably to show, that 'the Senior Cambridge Certificate is equivalent to 'School Certificate Scheme of Service, Superscale' listed under Division II at page 10 of P.P. 2/78 ...' Further more, the defendants say, 'Division II is for High School certificate (H.S.C.) as listed at the same page'.

- H [66] On this aspect of the action between the parties, the core issue would therefore appear to be: whether the plaintiffs have proved on balance of probability their entitlement to be emplaced in B8 salary scale. The plaintiffs' reply to the defendants' submission as above adumbrated seems to have attempted to draw support mainly from the 'Draft Scheme of Service' and the nature of duties undertaken by the plaintiffs. It seems no part of the plaintiffs' submission in reply focuses on para 4.1(i) (p 497 of exh D2/p 318 of exh P2) and para 8.2(i) (p 500 of exh D2/p 321 of exh P2) of PP2/78, which were specifically raised by the third and fourth defendants. The third and fourth defendants contended to the effect, that the plaintiffs failed to show the equivalency of the 'Senior Cambridge Certificate' to 'School Certificate Scheme of Service, Superscale'. With respect, as the plaintiffs bear the burden

of proof of proving their case on balance of probability (s 101 and 103 of the Evidence Act 1950), the plaintiffs ought to have dealt with this issue.

[67] As regards salary grouping of posts, presumably C10 is in group C and B8 is in group B. The said para 4.1(i) of PP2/78 clearly shows, that the entry qualification for direct appointment to the post in group B, was a diploma or high school certificate/*sijil tinggi persekolahan*, and for group C, SPM or the MCE and its equivalent. Now, under the 'Employment Classifications' column in Section IV of PP2/78 para 8.2(i) there appears to be 'Executive and Sub-Professional Group Division I', 'Executive and Sub-Professional Group Division II' and 'Executive and Sub-Professional Group Division III'. As indicated by PW1's testimony in re-examination: 'There is the deviation of the principles as recommended by the cabinet committee report to remunerate to pay the relevant Government public servant based on cabinet committee report. As such, all the plaintiffs in this matter should be emplaced in the correct emplacement salary scale by virtue of the privilege and perquisite accord in PP2/78 at page 321 of Ex. P.2. The correct salary emplacement is in group B in page 318 at paragraph 4.1(i)(b) and page 320 paragraph 8.2(i) under the heading 'Common Privilege Common Perquisites'...I am referring to the employment classification **sub-professional group division II under grade School Certificate Scheme of Service, Super scale** upon direct appoint (sic) and confirmed by Director as Technical Assistant'. (Emphasis added.)

[68] The emphasised phrase in bold would appear to be what the third and fourth defendants' counsel had in mind when she submitted to the effect, that the plaintiffs failed to show the equivalency of the 'Senior Cambridge Certificate' to 'School Certificate Scheme of Service, Superscale'. In this connection, it would appear pertinent to keep in mind the existence at the material time of the employment classification, 'Executive and Sub-Professional Group Division III.' Now, in view of the fact that the entry qualification for the salary group B is either a diploma or high school certificate/*sijil tinggi persekolahan* (para 4.1(i) PP2/78), and each of the plaintiffs' undisputedly having only Senior Cambridge Certificate, it would appear incumbent upon the plaintiffs, as seems implicit in the submission of learned counsel for the third and fourth defendants to show, that 'Senior Cambridge Certificate' is equivalent to 'School Certificate Scheme of Service, Superscale'. Based on the evidence adduced by the plaintiffs and the defendants, with respect, it would appear tenable the defendants' contention that the plaintiffs failed to do so.

[69] The plaintiffs' allegation of the defendants having perpetrated fraud on the plaintiffs is basically indicated by their averment in the statement of claim, (para 16): 'The defendants at all material time have *wrongfully, fraudulently, negligently and deliberately* failed to comply with the principles of CCR

- A implemented in the new scheme of service under the CCR in 1978, the New Technical Service Scheme and the Sistem Saraan Baru, as a result of which the plaintiffs have suffered irreparable loss and damage ...’ (Emphasis added.)
- B [70] I have earlier dealt with the serious ambiguity of this pleading, thereby rendering very difficult, if not impossible, any attempt to ascertain the precise nature and extent of the plaintiffs’ complaint and/or allegation in their pleadings. And by the same serious ambiguity, without ignoring the word ‘and’ between the words ‘negligently’ and ‘deliberately’ and substituting the word ‘or’
- C in place thereof, it would make it virtually impossible to properly formulate a response to the complaint and/or allegation. Only in their submission dated 15 September 2011 on p 43 did the plaintiffs seem to have raised an alternative contention, saying: ‘*Alternatively*, if the court is not minded to make a finding that there was fraud practiced on the defendants, the plaintiffs submit that the
- D plaintiffs have proven their case on the balance of probabilities that there was negligence and/or misrepresentation of material facts by the defendants to the said Tribunal’. (Emphasis added.)
- E [71] I said ‘... the plaintiffs *seem* to have raised an alternative contention ...’ because to begin with, contextually there seems to be something not quite right with the phrase ‘... there was fraud practiced *on* the defendants ...’. (Emphasis added.) Then, there is the matter of whether this contention was raised in the plaintiffs’ pleadings. It is to be noted that the wording of the fraud issue under
- F para 16 of the statement of claim, is substantially different from the wording of the aforesaid alternative contention in the submission on alleged negligence and/or misrepresentation on the part of the defendants. The respective meaning that could be gleaned from the para 16 and the said contention in the submission in the manner they are respectively worded could, therefore, be
- G seriously if not entirely different and/or inconsistent. In any case, quite clearly besides being too late, the contention in the submission could not be utilised to rectify the ambiguity in the pleading.
- H [72] Anyway, the defendants contend the court should not deal with this issue at all due to lack of evidence on the particulars of the alleged fraud. The defendants contend, correctly in my view, the purported particulars of fraud listed under the said para 16 are merely general allegations. With respect, vis a vis the fraud allegation, it would appear insufficiently clear both what the purported material facts particularised and the formulation of those purported
- I material facts or particulars to enable the defendants to properly response. A perusal of para 16 of the statement of claim seems to indicate the plaintiffs’ emphasis to be on the consequences of the defendants’ action, and insufficient focus was placed on precise ascertainment of material facts showing particulars of the alleged fraud.

[73] In this connection, it may also be not impertinent to note, that based on para 14 of the statement of claim, presumably vis a vis the decision of the Public Services Tribunal dated 22 November 1995 concerning the first plaintiffs' two anomaly claims, allegation of misrepresentation of facts and fraudulent conduct is attributed to the director general. Although unclear, it would appear in all probability 'director general' here refers to the director general of the Public Services Department, who is no longer a party to the action.

[74] It was for all the reasons adumbrated above, that the plaintiffs' action was dismissed with costs.

Action dismissed with costs.

Reported by Ashok Kumar

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